Rheem Manufacturing Company *and* United Steelworkers of America, AFL–CIO, Petitioner. Case 10–RC–14040

November 10, 1992

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

The National Labor Relations Board, by a three-member panel, has considered objections to an election held August 31, 1990, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 527 votes for and 467 against the Petitioner, with 3 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs, and, for the reasons set forth below, has decided to adopt the hearing officer's findings[1] and recommendations only to the extent consistent with this decision.

We adopt the hearing officer's recommendation to overrule the Employer's Objections 1, 4 through 7, and 13 through 17. Contrary to the hearing officer's recommendation, however, we also overrule the Employer's Objections 2, 3, and 8 through 11, and shall certify the Petitioner.

1. Objections 2, 3, and 8 through 10

Objection 2 alleged that the election was conducted in a manner which conveyed Board bias and prejudice in favor of the Petitioner and a lack of neutrality by the Board. Objection 3 alleged that the election was conducted in a manner which compromised the integrity of the election process and interfered with the fair operation of the election process. Objection 8 alleged that the election process, including but not limited to the handling of certain ballots by the Board agents, was conducted in a manner which created the appearance of irregularity and impropriety. Objection 9 alleged that the Board agents fraternized with, or conveyed the appearance of fraternizing with, a Petitioner representative between voting periods, and thus destroyed confidence in the election process and reasonably could be interpreted as impugning the Board's standards of integrity and neutrality. Finally, Objection 10 alleged that the Board agent made comments on a local issue in the campaign which destroyed, compromised, or impaired the appearance of neutrality by the Board.

During the break in voting after the third-shift voting period had ended at 6:30 a.m.,[2] three eligible voters, one of whom was purportedly having surgery later that morning and two others who were on vacation, individually and separately came to the polls and asked to vote. After getting permission from the parties' observers, Board agent Trimble allowed the employees to vote. Trimble unsealed the ballot box, which had been taped up at the close of the scheduled voting session, and the voters deposited their ballots into the box. Trimble then resealed the box.

Thereafter, while the polls were closed between voting sessions in the afternoon, three other eligible employees who were out of work on sick leave[3] or vacation appeared at the polls individually and separately and asked to vote.[4] After getting permission from the parties' observers, Trimble allowed these employees to vote. After marking their ballots, these employees handed the double-folded ballots to Trimble, who put each ballot in the breast pocket of his shirt. Trimble had announced to the observers that he would put the ballots in his shirt pocket and then would deposit them in the ballot box when the polls reopened. No challenged ballot envelopes were used.[5]

Sometime thereafter, Board agent Harrison, who had temporarily left the voting area, returned. Trimble told Harrison, in the presence of the observers, that he had allowed three employees to vote while the polls were closed and that when the polls reopened, they should quietly slip the ballots into the ballot box. Trimble handed the three folded ballots to Harrison, who put them in his briefcase. Only the observers were present during this time. When the parties' representatives returned to the cafeteria to prepare for the afternoon voting session, Harrison removed the three folded ballots from his briefcase and handed them to Trimble, who explained to the parties, outside the presence of employees, that these were the ballots of three employees who had been permitted to vote while the polls were closed; that he had given the ballots to Harrison to hold; and that the ballots had been handled only by himself and Harrison. The Employer's representative challenged the ballots, and they were placed in make-

[1] The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

[2] Third-shift employees voted during the first voting session scheduled from 6:15 to 6:30 a.m.; first-shift employees voted during the two voting sessions scheduled from 7:30 to 11:30 a.m., and from 1 to 2:30 p.m.; and second-shift employees voted during the voting session scheduled from 3:30 to 6:30 p.m.

[3] The first of these employees was in a wheelchair, having recently undergone surgery.

[4] Two other employees who were scheduled to work later that day also attempted to vote during the afternoon break. Trimble told these employees that the polls were closed and they should vote later with their respective departments.

[5] The Board agents had not brought any challenged ballot envelopes to the election.

shift challenged ballot envelopes. These three challenged ballots were never counted.

During the morning break between the third- and first-shift voting sessions, Trimble stated several times that it was hot in the voting area. At one point Trimble added that if he had to return to the plant in the future he might have to file his own petition, and that a large air-conditioning company like the Employer should be able to keep the area cool. At the time Trimble made these statements, one Employer observer and two Petitioner observers were present. One of the Petitioner's observers, Mallory, agreed with Trimble's statement. The hearing officer found that it appeared that the Employer's observer had already voted by the time Trimble's statement was made.[6] The hearing officer also stated that it was not clear whether the Petitioner's observers had voted by this time. The hearing officer also found that there was no evidence that Trimble's statement was repeated to other eligible voters during the day of the election.

During this same morning break between the third- and first-shift voting sessions, Harrison[7] announced to the observers and Trimble that he needed to go to his car. Mallory volunteered to guide him through the plant. During the course of this walk, many employees who had not yet voted saw Harrison, who they did not know, and Mallory, a known union proponent, conversing in a friendly fashion and occasionally laughing as they walked through the plant.

The hearing officer stated that the conduct of Trimble in allowing six employees to vote when the polls were closed is contrary to Board practice and procedure, but further stated that the observers' agreement that these employees be allowed to vote tended to negate, in great respect, the adverse effect such an occurrence might otherwise have had. The hearing officer further noted that this is particularly true where, as here, the ballots involved had no effect on the outcome of the election. The hearing officer then stated that aside from conduct which has an actual effect on elections, the Board is also concerned with assuring the appearance of neutrality and the integrity of its election process. She concluded that the receipt by Trimble of the three ballots in his hand and the ''subsequent bantering about'' of the unprotected ballots between the two Board agents, a shirt pocket, and a briefcase, compromised the integrity of the election process and constituted conduct which would destroy confidence in the Board's election process, citing *Jakel, Inc.*, 293 NLRB 615 (1989). She further concluded that the Board agents' impropriety in handling the ballots as they did, as well as the appearance of impropriety their conduct necessarily generated, warranted setting aside the election, citing *Paprikas Fono*, 273 NLRB 1326 (1984).

The hearing officer stated that in different circumstances Trimble's comment to observers about his possible need to file a petition of his own, although inappropriate as it showed displeasure with the Employer, might ''slip by'' as poor judgment. She also stated that similarly, ''Trimble's [Harrison's]''[8] walking through the plant talking and laughing with a high profile union observer might, in isolation, be given the benefit of the doubt rather than create the impression among employees of bias in favor of the Petitioner. She, however, concluded that viewed in the totality of the circumstances in which the Board agents conducted this election, the benefit of the doubt is totally misplaced. She concluded that the overall ''devil-may-care'' attitude that the Board agents, especially Trimble, exhibited in conducting this election and the appearance it presented could not be tolerated in the conduct of Board elections. Accordingly, she recommended that Objections 2, 3, and 8 through 10 be sustained.

The Petitioner in its exceptions argues that the election should not be set aside on the basis of Board agent misconduct because the evidence does not cast a reasonable doubt on the fairness and validity of the election. The Petitioner further contends that neither Harrison's walk through the plant with the Petitioner's observer, nor Trimble's comment about the heat, warrants setting aside the election, whether viewed separately or cumulatively. For the reasons that follow, we find merit in the Petitioner's exceptions.

In order to set aside an election on the basis of Board agent conduct, the Board must be presented with facts raising a ''reasonable doubt as to the fairness and validity of the election.'' *Polymers, Inc.*, 174 NLRB 282 (1969), enfd. 414 F.2d 999 (2d Cir. 1969), cert. denied 396 U.S. 1010 (1970). The evidence in support of the Employer's objections does not present such facts. Regarding the three employees who voted during the afternoon break and whose ballots were challenged, Trimble obtained the permission of both the Employer's and the Petitioner's observers before allowing each of the three employees to vote, handled the double-folded ballots in full view of the observers, and explained to the observers what he was doing with the ballots. When Board agent Harrison returned to the room, Trimble explained what had taken place and

[6] Although the Employer's observer could not specifically recall whether he had voted, he was a third-shift employee and the third shift had already voted, and at the time the statement was made he was waiting for an Employer representative to arrive so he could go home for the day.

[7] The hearing officer erroneously stated that two walks through the plant with Mallory occurred, one with Harrison and one with Trimble, and that the walk with Trimble was the one witnessed by employees. The record indicates that only one walk, with Harrison, occurred.

[8] We note again that the hearing officer erroneously stated that it was Trimble who walked through the plant with Mallory.

gave the ballots to Harrison, who placed them in his briefcase in full view of the observers. When the parties' representatives entered the room before the start of the next voting session, Trimble again explained what had happened, and Harrison removed the double-folded ballots from his briefcase and handed them to Trimble. The Employer then challenged the ballots, and the ballots were never counted and were not determinative of the election. Thus, although the handling of these ballots was not in conformance with usual Board procedures,[9] the handling was done in full sight of the observers; there was no suggestion of tampering, fabrication, or opening of the ballots; the ballots were in the Board agents' custody at all times, and were never taken from the election area; and the ballots were never counted and were not determinative of the election.

Further, we note that *Jakel*, supra, and *Paprikas Fono*, supra, both cited by the hearing officer, do not support a different result in the instant case. In *Jakel*, an employee who was voting subject to challenge placed her ballot in the ballot bag without first placing it in a challenge envelope. The Board agent reached into the ballot bag and removed a ballot which he believed to be that of the employee's, and which she then identified as such, and gave her a replacement ballot. The Board set aside the election on the basis that the removal of a ballot from the ballot bag by the Board agent compromised the integrity of the election process. In so finding, the Board stated that it could not be determined with reasonable accuracy whose ballot was extracted from the ballot bag, and that the ballot at issue was one of three challenged ballots which were determinative of the election.[10] Here, in contrast to *Jakel*, the Board agent's conduct did not impugn the integrity of the election in the same way that removing a ballot from the ballot box would, and the three ballots at issue were not determinative of the election results.

We similarly find that the conduct in *Paprikas Fono*, supra, in which the Board set aside the election, was considerably more compromising of the election's validity than the conduct in the instant case. In *Paprikas Fono*, the Board agent erroneously failed to put 21 determinative challenged ballots into an envelope in the presence of the parties. Rather, he put the challenged ballots into a large envelope the next day, when the parties could not verify that he had followed the proper procedures. Even more serious in the Board's view, was the Regional Office's subsequent conduct in opening the envelope to inspect the condition of the ballots outside the presence of any of the parties. Thus, the parties were deprived of the opportunity to monitor the Region's handling of the determinative challenged ballots and to assure themselves that the challenge envelopes were secure, and the Board concluded that the appearance of irregularity created by the procedures used raised a reasonable doubt as to the fairness and validity of the election. *Paprikas Fono*, supra at 1328. In contrast, here the observers were present at all times and could view the Board agent's handling of the ballots, the Board agent explained to the observers what he was doing with the ballots at each step, and the ballots were never taken from the election area; thus, a reasonable doubt as to the fairness and validity of the election was not raised.[11]

We also find that Trimble's comment about the heat in the plant and Harrison's walking through the plant with the Petitioner's observer Mallory do not warrant setting aside the election, whether considered separately or cumulatively. Regarding Trimble's comment about the heat, we note that it was heard only by three observers, and there was no evidence that the comment was repeated to other employees. The hearing officer found that the Employer's observer who was present when Trimble's remark was made had apparently already voted. She further found that it was unclear whether the two Petitioner's observers who were present had voted, but she noted that Trimble's comment would have less impact on employees already supportive of the Petitioner. We find that the instant case is similar to cases in which the Board has upheld election results notwithstanding improper comments by Board agents. For example, in *NLRB v. Allen's I.G.A. Foodliner*, 652 F.2d 594, 595 (6th Cir. 1980), enfg. 236 NLRB 1342 (1978), the Board agent stated to the employer's observer that ''if the employees had been treated right she would not be there holding the election.'' The Sixth Circuit noted that the Board agent's comment was improper, but it was not prejudicial, in view of the fact that no voters were present in the polling place when the remark was made, the remark was made at a time when most of the voters had cast their ballots, and there was no evidence that the remark was relayed to any voter who had not yet voted.[12] Here, in

[9] A Board agent's failure to follow the Board's casehandling guidelines will not necessarily warrant setting aside an election in the absence of a showing that the deviations from the guidelines raised a reasonable doubt as to the fairness and validity of the election. See *Kirsch Drapery Hardware*, 299 NLRB 363, 364 (1990).

[10] In a similar case in which these factors were not present, *K. Van Bourgondien & Sons*, 294 NLRB 268, 269 (1989), the Board declined to set aside an election where the Board agent had retrieved a challenged ballot from the ballot box, noting that the Board agent was able to retrieve the challenged voter's ballot because it was on top of the pile; the voter was able to identify the ballot as hers because of a fold on a corner she had made; and the vote on the ballot had been revealed to no one other than the challenged voter herself.

[11] Also, unlike in *Paprikas Fono*, the challenged ballots here were not determinative.

[12] See also, e.g., *Magic Pan, Inc. v. NLRB*, 627 F.2d 105 (7th Cir. 1980), enfg. 244 NLRB 630 (1979) (Board agent told union observer that he had worked at a legal clinic that handled matters for mem-

Continued

view of the fact that Trimble's comment was made only to observers (and the Employer's observer had already voted), and there was no evidence that the comment was repeated to other employees, we find that the comment was not prejudicial. Moreover, even though the comment concerned an issue in the campaign, the heat of the plant, we do not find that the comment was so extreme as to justify setting aside the election in the absence of prejudice on the theory that it destroyed the appearance of the Board's impartiality.[13]

Similarly, we do not find that Harrison's walking through the plant with Mallory impugned the Board's neutrality or gave the appearance of fraternization so that the election should be set aside. In *Calcor Corp*., 106 NLRB 539, 541 (1953), the Board held that no inference of Board support of the petitioner would be likely to be drawn by employees merely because a Board agent walked with the petitioner's representative through the plant to inspect the polling place on election day. Further, in *NLRB v. Michigan Rubber Products*, 738 F.2d 111 (6th Cir. 1984), enfg. 251 NLRB 74 (1980), the Sixth Circuit stated that a Board agent's allowing the union representative to carry the voting booth to the agent's car while the agent carried the ballot box and election kit, although perhaps imprudent, did not give the appearance of fraternization and could not have had any effect on the outcome of the election.[14] As in *Michigan Rubber*, we find that the conduct here of Harrison being walked through the plant by Mallory, even with the two of them talking and laughing, does not impugn the Board's neutrality or give the appearance of fraternization so as to warrant setting aside the election.

In sum, although we do not condone the Board agents' conduct here, we conclude that it did not raise a reasonable doubt as to the fairness and validity of the election, and thus was not sufficient to warrant setting the election aside. Thus, we overrule the Employer's Objections 2, 3, and 8 through 10.

2. The Employer's Objection 11

The Employer's Objection 11 alleged that the Petitioner engaged in electioneering at or near the polls during the election.

During the first- and third-shift voting sessions, employee Moore, a member of the Petitioner's Volunteer Organizing Committee (VOC),[15] spent substantial periods of time immediately outside the cafeteria doors,[16] talking to employees and loudly encouraging them to vote for the Petitioner as they entered the cafeteria to vote. Moore wore a union T-shirt and hat displaying the words, ''Union Yes.'' Sometimes, due to the large number of employees attempting to enter the cafeteria at one time, potential voters backed up in a line outside the cafeteria's doors. Moore's statements could not be heard inside the cafeteria. Moore also sometimes accompanied groups of employees as they walked to the cafeteria from their departments, talking with them and otherwise shouting and encouraging them to ''vote yes.''

At around 2 p.m., employee William Burnett Sr., also a VOC member, was released with his department to vote. Burnett began campaigning loudly for the Petitioner as his department's 60 or so employees walked to the cafeteria. On reaching the cafeteria, Burnett remained outside while the other employees stood in line to enter the cafeteria, and he loudly and continually urged the employees to vote for the Petitioner. Burnett also repeatedly asked potential voters if they knew that a white female had been promoted to a supervisory position over more senior black men.[17] Burnett did not continue to campaign once he entered the cafeteria.

The hearing officer found that the majority of eligible voters were scheduled to vote during the times that Moore and Burnett were campaigning immediately outside the voting area doors and in a place where employees often lined up to enter the polling place.[18] The hearing officer further noted that although the cafeteria had been designated as the voting area and signs were placed on the outside of the cafeteria doors stating that

bers of the union); and *NLRB v. Dobbs Houses*, 435 F.2d 704 (5th Cir. 1970), enfg. 172 NLRB 1781 (1968) (Board agent stated to observers that he thought the union would win the election and that it would do the people a lot of good).

[13] *Abbot Laboratories v. NLRB*, 540 F.2d 662, 665 fn. 1 (4th Cir. 1976).

[14] The Sixth Circuit distinguished that case from *Athbro Precision Engineering Corp*., 166 NLRB 966 (1967), vacated sub nom. *Electrical Workers IUE v. NLRB*, 67 LRRM 2361 (D. D.C. 1968), on remand 171 NLRB 21 (1968), enfd. 423 F.2d 573 (1st Cir. 1970), in which the Board set aside an election where a Board agent was seen between voting periods having a beer with a union representative, stating that the situation in *Athbro* would imply to any witness a social or business bond between the agent and union representative, whereas in *Michigan Rubber* the situation could be based entirely on practical logistics. The Sixth Circuit also distinguished *Provincial House v. NLRB*, 568 F.2d 8 (6th Cir. 1977), denying enf. 222 NLRB 1300 (1976), in which a Board agent was seen at a restaurant where a union organizational meeting was taking place and the agent was introduced at the meeting, on the basis that allowing a union representative to carry the polling booth to an agent's car does not rise to the same level of conduct as a Board agent being introduced at a union meeting.

[15] The hearing officer found and we agree that the members of the VOC were not agents of the Petitioner.

[16] The voting took place in the cafeteria.

[17] There had been concern among the employees for several years that the Employer did not select minorities, particularly blacks, for promotion to supervisory positions. On the day of the election, the Petitioner's observer challenged a white female voter who she erroneously thought had been promoted to a supervisory position. The rumor that this woman had been promoted to a supervisory position spread through the plant on election day. We agree with the hearing officer's recommendation that the Employer's Objection 13, which alleged that the Petitioner communicated inflammatory information in order to induce employees to vote for the Petitioner, be overruled.

[18] Employees also lined up to vote inside the cafeteria. At times, there were 40 or 50 employees waiting to vote inside the cafeteria.

it was the polling area, the Board agents had not specifically designated the area right outside the cafeteria doors as a no-electioneering area.[19]

The hearing officer found, however, that the area immediately outside the cafeteria doors and adjacent thereto constituted part of the voting area, citing *Pepsi-Cola Bottling Co*., 291 NLRB 578 (1988), and *Westwood Horizons Hotel*, 270 NLRB 802 (1984). Further, citing *Milchem, Inc*., 170 NLRB 362 (1968), she stated that the Board has long held that ''the potential for distraction, last minute electioneering or pressure, and unfair advantage from prolonged conversations between representatives of any party to the election and voters waiting to cast ballots is of sufficient concern to warrant a strict rule against such conduct, without inquiry into the nature of the conversation.'' She concluded that in view of the foregoing, the sustained campaigning on behalf of the Petitioner by employees Moore and Burnett constituted objectionable conduct. She also stated that although the *Milchem* rule refers to representatives of the parties, the Board held in *Pepsi-Cola* that conduct of this nature by nonagents is also violative of the rule. She therefore recommended that Objection 11 be sustained.

The Petitioner in its exceptions contends that the hearing officer misapplied the *Milchem* standard to this case. The Petitioner also contends that under the applicable third-party standard, the electioneering here does not warrant setting aside the election. We find merit in the Petitioner's exceptions.

We note first that the hearing officer misapplied the *Milchem* standard to the facts of this case. The *Milchem* standard applies to parties or representatives of parties, and the Board in *Pepsi-Cola*, supra, did not extend the *Milchem* standard to nonparties. Thus, as the electioneering here was engaged in by nonagent employees, the proper standard to be applied is the third-party standard, i.e., ''whether the conduct at issue so substantially impaired the employees' exercise of free choice as to require that the election be set aside.'' *Southeastern Mills*, 227 NLRB 57, 58 (1976).

We further find *Pepsi-Cola* distinguishable from the instant case. In *Pepsi-Cola*, during the first 15 to 25 minutes of the election, approximately 20 union supporters (out of a unit of approximately 100) formed lines on both sides of the aisleway outside the lunchroom (the voting area), perpendicular to the line of employees waiting to vote. The Board in *Pepsi-Cola* described this situation as forcing employees to pass through a ''gauntlet'' on their way to vote and to be subjected to the union supporters' chants, cheers, clapping, and remarks, the effect of which the Board found to be magnified by the line formation. The Board also attached greater significance to the boisterous prounion conduct of the union supporters because it occurred within what the Board found to be a no-electioneering area. The Board concluded that in these circumstances, and particularly because the election margin was only one vote, the election did not reflect the free choice of the employees and should be set aside.

In the instant case, at any given time there was only one employee union supporter outside the cafeteria doors urging the employees to vote for the Petitioner, rather than a line of union supporters, and there was nothing like the ''gauntlet'' that employees had to pass through in *Pepsi-Cola*. In these circumstances, even assuming that the electioneering conduct here occurred in a no-electioneering area,[20] we do not find this third-party conduct to be so coercive and disruptive as to substantially impair the employees' exercise of free choice. *Southeastern Mills*, supra; *Firestone Textiles Co*., 244 NLRB 168, 170 (1979); *NLRB v. Aaron Bros. Corp*., 563 F.2d 409, 412 (9th Cir. 1977), enfg. 223 NLRB 1179 (1976).

In conclusion, contrary to the hearing officer, we overrule the Employer's Objections 2, 3, and 8 through 11. Accordingly, as the tally of ballots shows that the Petitioner has received a majority of the valid ballots cast, we shall certify it as the collective-bargaining representative of the employees in the appropriate unit.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for United Steelworkers of America, AFL–CIO, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All regular full-time production and maintenance employees employed by the Employer at its Milledgeville, Georgia, plant, including group coordinators, but excluding summer temporary employees, all technical employees, sales employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

MEMBER OVIATT, dissenting.

I would, like the hearing officer and for her reasons, set the election aside based on the conduct of the Board agents. The majority explains away each aspect

[19] The hearing officer noted that it appeared that this area was not patrolled, reviewed, or otherwise considered by the Board agents to be part of the area under their control for voting purposes. She also noted that on one occasion, a Board agent ensured that all the voters were inside the cafeteria before commencing the voting.

[20] In view of our finding that the electioneering conduct here was not objectionable even if it occurred within a no-electioneering area, we find it unnecessary to pass on the hearing officer's finding that the area immediately outside the cafeteria doors was part of the voting area. In so finding, we note that the area outside the cafeteria doors was not the actual polling place, and that once inside the cafeteria the employees had time to reflect on their voting decision free of interference, as employees also lined up inside the cafeteria waiting to vote.

and item of the objectionable conduct on a logical, legal basis. That cannot, however, remove the overall impression of the conduct of this election. The Board must persevere in its efforts to provide employees with the laboratory conditions for voting that we have historically sought. That may be accomplished here only by setting this election aside and properly conducting a new election.